SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 573

NEW YORK MAIL AND NEWSPAPER TRANSPORTATION COMPANY, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

REPLY BRIEF FOR PETITIONER

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ARGUMENT

Respondent's position is grounded on the assumption that the pneumatic tube statute of December 27, 1950, itself specifically required advertising in the circumstances of petitioner's contract. Only in a final footnote does respondent treat petitioner's contention, advanced alternatively, that even if the 1950 statute did require advertising, that statute was still to be read in consonance with the general advertising statute and the exceptions specified therein. (41 U.S.C. § 5). When these statutes (and exceptions) are read together, it is clear petitioner's contract falls within the specified exceptions and that advertising is not required.

1. Respondent seeks to discover proof for its main point—the assumption that the 1950 tube statute required advertising—in the legislative history of a postal appropriation bill of 1902 (32 Stat. 107, 114). The relevance of this legislative history, it is argued,

follows from the fact that the December 27, 1950 tube statute "was simply a reenactment of the pneumatic tube provision contained in prior appropriation acts." (Resp. Brief, 12).

But, as petitioner has demonstrated, this theory is untenable because of the fact that Congress was fully aware of petitioner's status as the sole owner of a tube system in New York City when, after important amendment, it enacted the 1950 law authorizing the tube contract (Pet. Brief, 9, 12, n. 6).

This knowledge of petitioner's status led Congress to delete from the 1950 tube statute the stringent and restrictive advertising requirements found in earlier legislation. As respondent itself carefully points out (Resp. Brief, 13), earlier pneumatic tube statutes had authorized the Postmaster General to enter into pneumatic tube contracts "*after public advertisement once a week for a period of six consecutive weeks . . .*" (emphasis supplied). The 1950 tube statute eliminated this provision and replaced it with language which, as the dissenting opinion indicates (Pet. Brief, 15a-16a), did not *require* advertising.[1]

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[1] The other changes in the advertising provisions of the earlier law follow logically from the omission in the 1950 statute of the requirement that contracts be entered into after advertisement. The pneumatic-tube statute in effect prior to December 27, 1950 required (1) that before an advertisement could be made, the Postmaster General must secure a favorable report on the necessity for pneumatic-tube service from a commission of three postal experts; (2) that following such favorable report, the service must be advertised publicly in general terms once a week for six consecutive weeks in five newspapers, one of which newspapers must be in each city where service was to be performed; (3) that no advertisement at all should issue until in the judgment of the Postmaster General the needs of the Postal Service were such as to justify the expenditure of the sums involved. None of those provisions were contained in the December 27, 1950 legislation.

Respondent is hard pressed to minimize this material change effected by the 1950 tube statute. Respondent does not attempt to refer to the statutory language itself in support of the argument that the statute required advertising. This, indeed, would be difficult. Instead, respondent points to the circumstances surrounding the pneumatic tube statute enacted in 1902, more than a half-century ago when entirely different problems confronted Congress. In the face of the clear legislative history of the 1950 statute which discloses Congress' full understanding of petitioner's status and its expectation that the tube contract would be entered into with petitioner, this reference to turn-of-the-century legislation for 1950 legislative intent has no application here. Respondent's reference to the 1902 statute should, in fact, be dealt with as briefly and simply as the 1950 tube statute treated it—as "repealed."[2]

Factually viewed, moreover, respondent's contention that the 1950 tube statute required advertising is impossible. When the limitations of time and the circumstances in which the 1950 tube statute was enacted are remembered, it appears certain that Congress did not intend to require advertising. The statute was enacted on December

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[2] Section 4 of the Act of December 27, 1950, the statute under which petitioner's contract was executed, states that

> "All laws or parts of laws inconsistent or in conflict with this Act are hereby repealed. This shall include, but is not limited to, the following laws:
>
> "(a) The provisions of the Acts of April 21, 1902; March 2, 1907; May 27, 1908; and June 19, 1922 (39 U.S.C. 423) relating to contracts for transmission of mail by pneumatic tubes, . . ."

27, 1950, four days before petitioner's existing contract was to expire. Congress specifically recognized the "urgency of the request" (96 Cong. Rec. 14665). In four days it would have been impossible to advertise "once a week for a period of six consecutive weeks."

2. Respondent meets petitioner's alternative contention—that the general advertising statute and its exceptions apply even if the pneumatic tube statute contemplated advertising—by relegating it to a footnote, terming it "curious," and distorting it slightly (Resp. Brief, 15, n. 5). Petitioner does not contend that "specific advertising requirements are superfluous legislation." Quite the contrary, it is petitioner's view that procurement statutes which specifically require advertising and those which do not are governed by the provisions of the general advertising statute and its exceptions. The reason for the universal applicability of the general statute's exceptions is, simply, that to require advertising for every contract in all situations would be useless, wasteful, and practically meaningless. As the general statute itself states, it is applicable "unless otherwise provided by law." This clearly indicates its applicability when a specific procurement statute requires advertising by its own terms. The majority opinion below (Pet. Brief, 7a) accepted this analysis when it felt called upon, in the face of contrary legislative and administrative statements, to reject expressly the applicability of the "public exigency" exception of the general advertising statute in interpreting the 1950 pneumatic tube statute to require advertising.[3]

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[3] In this light, the weakness of respondent's attempt to minimize the conflict the decision below poses with United States v. Speed,

Thus, it is obvious that the construction placed by the Court below upon the specific exceptions of the general advertising statute goes far beyond the operation of the pneumatic tube statute and gravely concerns all government procurement statutes which contemplate advertising.

Respectfully submitted,

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8 Wall. 77, becomes evident. Respondent states: "The statute in Speed . . . expressly authorized the officer charged with procuring the supplies involved to dispense with advertising in his discretion . . ." (Resp. Brief, 15). But the statute involved in Speed was the literal predecessor of 41 U.S.C. § 5, the general advertising statute. The issue must still be met of the applicability of the general statute and its exceptions to the pneumatic tube contract involved here. This issue can not be avoided by the assertion that "the pneumatic tube statute does not recognize a 'public exigency' exception," for such a statement merely assumes the conclusion to be reached through a process of logical statutory interpretation.